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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY JEROME DANIELS,

Defendant and Appellant.

B214593

(Los Angeles County
Super. Ct. No. VA104404)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Kelly Jerome Daniels (“Daniels”) appeals his convictions for assault on a peace officer (Pen. Code,¹ § 245, subd. (c)), battery with injury on a peace officer (§ 243, subd. (c)(2)), and misdemeanor vandalism (§ 594, subd. (a)). On appeal, Daniels challenges the jury’s finding that he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). We conclude that substantial evidence supported the jury’s true findings on the gang enhancement allegations, and accordingly, affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Information

In an amended Information, the Los Angeles County District Attorney charged Daniels with one count of assault on a peace officer (§ 245, subd. (c)), one count of misdemeanor vandalism (§ 594, subd. (a)), and one count of battery with injury on a peace officer (§ 243, subd. (c)(2)). The Information alleged that, pursuant to section 186.22, subdivision (b)(1), Daniels committed each of the charged offenses for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. It also alleged that Daniels had suffered one prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and one prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Daniels pleaded not guilty to all counts and denied all special allegations.

II. Evidence at Trial

A. The Alleged Crimes

On February 5, 2008, at approximately 11:15 p.m., Deputy Sheriffs Juan Quezada and Jeremy Carr of the Los Angeles County Sheriff’s Department were patrolling the

¹ All further statutory references are to the Penal Code.

8900 block of Compton Avenue, an area occupied by the 89th Street East Coast Crips gang. Deputy Quezada was driving and Deputy Carr was seated in the front passenger seat. From their patrol car, the deputies observed two men near the intersection of Compton Avenue and 90th Street. As one man stood on the street, the other spray painted the wall of a church with the phrase “89 ST ECCG,” which the deputies interpreted as a reference to the 89th Street East Coast Crips gang. Similar fresh graffiti was later found at two other locations in the area. Deputy Quezada identified Daniels as the man who was spray painting the wall of the church. When Deputy Quezada pulled up in the patrol car, Daniels turned around. Facing the deputies, he put his hands in the air while holding a spray paint can in one hand. Daniels then turned and ran. The other man also fled on foot.

Deputy Quezada maneuvered the car to cut Daniels off. As the patrol car came to a stop, Deputy Carr prepared to exit through the passenger door. Daniels then turned toward Deputy Carr and, from a distance of about five feet, threw a spray paint can at Deputy Carr through the open passenger window. The can struck Deputy Carr in the face, cutting him from the left nostril to the lip and causing him to bleed. After throwing the can, Daniels continued running into an alley. Deputy Quezada followed him for a short distance, but then decided to tend to Deputy Carr and wait for back up. Deputy Carr could not identify the person who threw the spray paint can at him, but Deputy Quezada was certain it was Daniels.

Deputies Quezada and Carr provided physical descriptions of the two suspects, which were broadcast via radio to the responding units. Daniels was described as a Black male about five feet seven inches in height wearing a blue or green hooded sweatshirt and black pants. The other man was described as a Black male about six feet one inch in height wearing a black hooded sweatshirt and black pants. Deputy Carr also broadcast that both men appeared to be age 18 to 20, although Daniels was actually 37 years old at the time. Deputy Carr acknowledged that he only “got a quick glance” at the suspects, and had guessed their age based on the fact that persons who spray paint graffiti are generally younger.

The responding units set up a containment area covering one to two city blocks. Three canine teams, including Deputy Sheriff Richard Conti and his dog, searched the containment area for approximately one hour before locating Daniels. As part of the search protocol, Deputy Conti first drove slowly through the area and used the public address system in his patrol car to announce that the area was about to be searched by police dogs. He advised residents to remain inside and the suspect to surrender. At some point during the search, air patrol informed the canine units that it had detected a heat source at an abandoned house on 89th Street using infrared technology. Once the canine units arrived at that location, Deputy Conti issued another warning announcement, waited to see if anyone surrendered, and then deployed one of the dogs. The dog located Daniels at the heat source and bit his leg as Daniels kicked and wrestled with the dog. After calling off the dog, Deputy Conti arrested Daniels and called for medical assistance to treat his bite. At the scene, Deputy Quezada identified Daniels as the person who spray painted the wall and struck Deputy Carr with a spray paint can.

B. The Expert Testimony on Criminal Street Gangs

Los Angeles Police Detective Shawn Shaw testified as a gang expert on behalf of the prosecution. An 18-year veteran of the police force, Shaw had been assigned to a gang unit for the past two years. His prior training and experience in gang enforcement included a 40-hour course on criminal street gangs and their subcultures, seven years at the Men's Central Jail where he worked on gang floors and informally interviewed thousands of gang members about their lifestyles, rivalries and allegiances, and nine years as a patrol officer during which he had contact with gang members as both victims and perpetrators of crime and arrested over 300 gang members. In his current assignment as a gang detective, Detective Shaw was responsible for reviewing crime reports and in-custody cases to assess them for gang-related activity. He was not assigned specific cases, but instead selected his own cases and only handled those that met gang criteria. One of Detective Shaw's primary duties as a gang detective was to gather gang intelligence. He spent the majority of his time in the field talking to gang members and their families and becoming familiar with their neighborhoods.

Detective Shaw testified that gangs are territorial and claim certain geographic areas as their own. Gangs members mark their territory by displaying graffiti with their gang's name, and they disparage rival gangs by defacing their rivals' graffiti. A gang member also may get gang tattoos to prove his or her allegiance to the gang. According to Detective Shaw, respect, reputation, and status are important aspects of gang culture. A strong gang commands respect which allows it to conduct illegal activities without interference from citizens or rivals. A gang builds its reputation and gains respect by committing crimes and intimidating rival gangs and community residents.

Detective Shaw and his partner were responsible for monitoring all of the East Coast gang sets in their jurisdiction, including the 89th Street East Coast Crips. Detective Shaw explained that the 89th Street East Coast Crips came into existence in the late 1970s and currently had about 200 members. The gang had several rivals and generally used "89 ECC" as its symbol. Detective Shaw testified that the primary activities of the 89th Street East Coast Crips were narcotic sales, street robberies, and burglaries. Detective Shaw was aware of the gang's primary activities because he reviewed all of the cases involving possible gang-related activity as part of his current job duties. In the past, Detective Shaw investigated a case in which an admitted member of the 89th Street East Coast Crips was convicted in 2008 of making a criminal threat. Detective Shaw also investigated a case in which another admitted member of the gang was convicted in 2007 of assault with a deadly weapon.

Detective Shaw testified that Daniels was a self-admitted member of the 89th Street East Coast Crips. According to Detective Shaw, two of his partners had completed field identification cards for Daniels in January 2008 which documented that Daniels admitted to being a member of the gang, displayed gang tattoos, and was seen loitering in an area occupied by the gang although he did not live there. Daniels also had a visible tattoo on his face of the numbers "8-9."

The prosecutor presented Detective Shaw with a hypothetical in which a member of the 89th Street East Coast Crips was spray painting gang graffiti on a wall in the gang's territory, was interrupted by a peace officer, fled when the officer tried to make

contact with him, and then injured the officer by throwing an object at his face when the officer attempted to detain him. Based on the hypothetical, Detective Shaw opined that the gang member would have committed the crimes for the benefit of his gang. Detective Shaw reasoned that the graffiti benefited the gang because it announced to rival gangs, local citizens, and law enforcement that the 89th Street East Coast Crips were claiming that territory as their own. Detective Shaw explained that the physical assault on the police officer also benefited the gang because injuring or killing an officer bestowed a badge of honor on the perpetrator, which would give both the gang and the individual gang member notoriety within the neighborhood. It was also Detective Shaw's opinion that the perpetrator in the hypothetical would have committed the offenses with the specific intent to promote, further, or assist in the criminal conduct of the gang. Detective Shaw testified that the graffiti promoted the gang by marking its territory. With respect to the assault on the officer, Detective Shaw stated that "Mr. Daniels could have surrendered peacefully and been taken into custody. He chose the other way. He chose to attempt to flee and in the same instance injure an officer in the process."

C. The Defense Case

Daniels testified in his own defense. According to Daniels, on the evening of February 5, 2008, he was attending a gathering on 88th Street. At some point, he agreed to walk one of his female friends to her nearby home and then began heading back to the gathering via an alley near 88th Street. As Daniels was walking through the alley, he encountered two acquaintances who ran past him and explained that the police were coming. Daniels ran, jumped over a fence, and hid in a gated area by some abandoned houses. He decided to hide because he believed that the police bothered people in that neighborhood for no particular reason. After a period of time, Daniels came out of hiding and saw the perimeter of a containment area, which he knew he could not pass. When the officers found Daniels, they instructed him to put his hands up and he complied. The officers then ordered a police dog to attack. Daniels described himself as a peaceful person and denied that he spray painted graffiti on a church wall or threw a spray paint can at Deputy Carr.

III. Verdict and Sentencing

At the conclusion of the trial, the jury found Daniels guilty of all charges. The jury also found true each of the gang enhancement allegations. Following Daniels' admission of the prior felony strike, the trial court sentenced him to an aggregate term of 18 years in state prison. The sentence consisted of four years on the assault count, doubled to eight years pursuant to the Three Strikes law, plus one additional five-year term pursuant to section 667, subdivision (a)(1), and one additional five-year term pursuant to section 186.22, subdivision (b)(1). The court imposed a concurrent one-year term on the vandalism count, and imposed and stayed a seven-year term on the battery count pursuant to section 654. On February 26, 2009, Daniels filed a timely notice of appeal.

DISCUSSION

On appeal, Daniels challenges the sufficiency of the evidence supporting the gang enhancements on two grounds. First, he contends that the evidence was insufficient to show that the "primary activities" of the 89th Street East Coast Crips were to commit certain enumerated criminal acts within the meaning of section 186.22, subdivision (f). Second, Daniels claims that there was insufficient evidence to prove that he committed the charged offenses with "specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b). Based on our review of the record, neither of Daniels' arguments has merit.

I. Standard of Review

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature with the express purpose "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement provision for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons,

whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [section 186.22, subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

(§ 186.22, subd. (f).) The specific acts set forth in subdivision (e) include robbery, burglary, and sales of certain controlled substances. (§ 186.22, subd. (e).)

In assessing the sufficiency of the evidence in a criminal case, ““we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We must presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for a lack of sufficient evidence only if ““upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard of review applies to a claim of insufficient evidence to support a gang enhancement allegation. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

II. Primary Activities of the Gang

To establish that a gang is a “criminal street gang,” the prosecution must prove that the gang has as one of its “primary activities” the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and that it has engaged in a “pattern of criminal gang activity” by committing two or more such “predicate offenses.” (§ 186.22, subs. (e), (f); see *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) On appeal, Daniels contends that the testimony of the prosecution’s gang expert, Detective Shaw, failed to constitute sufficient evidence as to the primary activities of the 89th Street East Coast Crips. He argues that the testimony was impermissibly conclusory because Detective Shaw did not identify any particular instances of the gang’s primary activities or the specific circumstances involved. He also asserts that the testimony lacked an

adequate foundation because Detective Shaw did not describe when, where, or how he obtained the information that formed the basis for his opinion. We disagree.

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations,” as opposed to the occasional commission of those crimes by one or more of the group’s members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) “The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang’s primary activities. [Citations.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465; see also *People v. Gardeley, supra*, 14 Cal.4th at pp. 619-620 [expert testimony by police detective “provided much of the evidence necessary to establish that the [defendant’s gang] met the [gang statute’s] definition of a ‘criminal street gang’”].)

During his expert testimony, Detective Shaw did not equivocate in describing the primary activities of the 89th Street East Coast Crips. He testified that the gang’s primary activities were narcotics sales, street robberies, and burglaries. Robbery, burglary, and sales of certain controlled substances are all crimes enumerated in section 186.22, subdivision (e), and Daniels does not contend otherwise. (See § 186.22, subd. (e)(2) [robbery], (4) [sale of controlled substances], & (11) [burglary].) Detective Shaw was also unequivocal in his testimony that these were the “principal” crimes of the gang, and that the gang engaged in these crimes “consistently and repeatedly.” The fact that Detective Shaw failed to provide a specific example of a drug sale, robbery or burglary committed by a particular gang member did not render his testimony conclusory or beyond the scope of his expertise. ““Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree

of his knowledge goes more to the weight of the evidence than its admissibility.”

[Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 322.)

Contrary to Daniels’ claim, Detective Shaw also provided an adequate foundation for his opinion on the gang’s primary activities. He testified to having extensive training and experience in gang culture and gang crimes, thus demonstrating the special knowledge, skill, experience and training sufficient to qualify him as an expert. As described by Detective Shaw, he had been a police officer for 18 years, had been monitoring the 89th Street East Coast Crips for 10 years, and had been a gang detective for two years. His experience included numerous custodial and non-custodial interviews with gang members, personal reviews of crime reports and in-custody cases for gang-related crimes, and personal investigations of crimes committed by gang members. His current job duties included gathering gang intelligence in the field on a daily basis and monitoring the East Coast gangs in his jurisdiction, including members of the 89th Street East Coast Crips. When asked for the basis of his opinion on the gang’s primary activities, Detective Shaw reiterated that he was responsible for reviewing cases for gang-related crimes and that he only handled cases where the suspected perpetrators were gang members. The foundation for Detective Shaw’s expert opinion was therefore well-established. (See, e.g., *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 [gang expert’s “eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony” about the gang’s primary activities]; *People v. Duran, supra*, 97 Cal.App.4th at p. 1465 [gang expert’s “personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes” provided adequate foundation for his testimony about the gang’s primary activities].)

Daniels’ reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, is misplaced. In *Alexander L.*, the appellate court reversed a true finding on a gang enhancement allegation on the ground that the gang expert’s testimony was insufficient to support the primary activities element. (*Id.* at pp. 611-614.) When asked about the gang’s primary activities, the expert testified, “I know they’ve committed quite a few assaults with a

deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.” (Id. at p. 611.) However, the expert did not explain the basis for his knowledge, and on cross-examination, he conceded that the vast majority of cases involving the gang were graffiti-related. (Id. at pp. 611-612.) As this Court explained in *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107-108, the expert testimony in *Alexander L.* was insufficient to support a gang enhancement because the witness failed to testify that the crimes he cited constituted the gang's primary activities, equivocated on direct examination, and contradicted himself on cross-examination. Detective Shaw's testimony, on the other hand, suffered from none of these defects. Accordingly, the expert opinion evidence in this case was sufficient to establish the primary activities element of the gang enhancement allegations.

III. Specific Intent to Promote, Further, or Assist in Criminal Gang Conduct

To obtain a true finding on a gang enhancement allegation, the prosecution also must prove that the crime at issue was committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).). Daniels claims that the expert testimony could not establish that he acted with the requisite intent because Detective Shaw improperly referred to Daniels in responding to hypothetical questions that were posed by the prosecution on the issue of intent. Daniels also contends that, even if properly admitted, Detective Shaw's testimony did not show that he assaulted a peace officer in order to promote criminal gang conduct, but instead demonstrated that his actual intent was to evade arrest. Daniels' arguments on the specific intent element of the gang enhancements do not withstand scrutiny.

Gang expert testimony may properly be admitted to prove motive and intent. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549-1551; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509.) Indeed, expert testimony repeatedly has been deemed admissible to prove the motivation for a particular crime and whether the crime was committed to benefit or

promote a gang. (*People v. Garcia, supra*, at p. 1513; *People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1550; *People v. Valdez, supra*, at p. 509.) Although an expert witness may be prohibited from testifying about a defendant’s subjective knowledge or intent, the expert generally may provide opinion testimony on the basis of facts presented in a hypothetical question that asks the expert to assume their truth. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947; *People v. Gardeley, supra*, 14 Cal.4th at p. 618.) “Such a hypothetical question must be rooted in facts shown by the evidence” (*People v. Gardeley, supra*, at p. 618.) However, “[t]here is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case.’ [Citations.]” (*People v. Valdez, supra*, at p. 507.) Thus, in response to a hypothetical question that assumes the truth of the trial evidence, an expert may testify that a particular criminal act was committed to benefit or promote a gang. (*People v. Gardeley, supra*, at pp. 618–619; *People v. Garcia, supra*, at pp. 1512-1514.) Such opinion evidence may be sufficient to support a true finding on a gang enhancement allegation.

Daniels argues that Detective Shaw impermissibly testified as to Daniels’ specific intent. He points out that in response to the prosecution’s hypothetical questions about whether the charged crimes had a gang-related purpose, Detective Shaw made a direct reference to Daniels, testifying that “Mr. Daniels could have surrendered peacefully and been taken into custody. He chose the other way. He chose to attempt to flee and in the same instance injure an officer in the process.” As a preliminary matter, we note that Daniels never objected to this testimony at the time of trial, nor asked the trial court to issue a curative instruction striking the testimony. By failing to assert a timely objection before the trial court, Daniel has forfeited this argument on appeal. (See *People v. Ward* (2005) 36 Cal.4th 186, 211 [objection to expert testimony was forfeited where defendant failed to object on the same basis at trial]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208 [general objection to entirety of gang expert testimony did not preserve objection to expert opinion on issue of defendant’s intent to benefit the gang].) Yet even assuming that Daniels has preserved the issue for appeal, his argument still fails on the merits.

The record reflects that the prosecutor asked Detective Shaw a series of fact-based hypothetical questions that were designed to elicit his expert opinion as to whether the crimes at issue were committed for the benefit of the 89th Street East Coast Crips, and with the specific intent to promote, further, or assist in the criminal conduct of the gang.²

² According to the reporter's transcript of the trial, the prosecutor and Detective Shaw engaged in the following exchange:

[Prosecutor:] I'd like to present a hypothetical, Detective Shaw. [¶] If a gang member, who's a member of 89 East Coast Crips, is in the neighborhood spray painting on the wall "89 East Coast Crips," on a street where there's numerous other tagging in close proximity and then when an officer attempts to make contact with him, he tries to flee, and when the officer then tries to detain him[,] he throws an object in his face at close distance, causing injury, in your opinion, would that crime or those crimes that I listed, do you have any opinion as to whether that hypothetical, the crimes in that hypothetical were committed for the benefit of the 89 East Coast Crips gang?

[Defense counsel:] Objection, compound.

The Court: I'll allow it.

[Detective Shaw:] Yes.

[Prosecutor:] What is the basis of that opinion?

[Detective Shaw:] Based on my expert opinion and all my experience and my training, that hypothetical would be on a couple of reasons; one, the person in the hypothetical is spray painting gang graffiti. That's benefiting the gang by claiming their territory, letting the rivals know that is our neighborhood, letting citizens and law enforcement know. [¶] The second part of that hypothetical is either attempting to and/or completing the act of striking any officer, allows that individual to gain notoriety within the gang. And oftentimes, when an officer is injured it will make the news, thus giving the gang more notoriety to its rivals.

[Prosecutor:] Is there something special within a gang about committing a crime against a police officer?

[Detective Shaw:] Yes, there is.

[Prosecutor:] Can you elaborate on that?

In presenting this hypothetical scenario, the prosecutor did not pose any questions about Daniels' particular state of mind or whether he had any specific knowledge or intent. In response to the prosecutor's inquiry, Detective Shaw testified that, based on the facts posed in the hypothetical, it was his opinion that the crimes would have been committed for the benefit of the gang and with the specific intent to promote criminal gang conduct. It is true, as Daniels asserts, that in rendering his opinion on this issue, Detective Shaw made one direct reference to Daniels when he stated that Daniels could have surrendered peacefully, but instead chose to attempt to flee and to injure an officer in the process. However, when read as a whole, Detective Shaw's testimony demonstrates that he was still responding to the prosecutor's hypothetical when he mentioned Daniels by name, and that he was not attempting to offer an opinion as to Daniels' subjective intent in

[Detective Shaw:] The notoriety that a gang member will gain from injuring or killing [an] officer puts that gang member on a pedestal within other members of the gang. [¶] And that goes so far as to convictions, they are given -- once they go to state prison they are given special housing or marked with some kind of identification, whether it be a wristband, a jumpsuit, that they have prior assaults against officers.

[Prosecutor:] So it's some sort of prestige or trophy?

[Detective Shaw:] A common term would be a badge of honor.

[Prosecutor:] Do you have an opinion as to whether the crimes in that hypothetical that I gave you was committed with the specific intent to promote, further, or assist in any criminal conduct by the street -- criminal street gang?

[Detective Shaw:] Yes.

[Prosecutor:] What is that?

[Detective Shaw:] In my opinion that it is by the pure fact of the intent of marking up the neighborhood, claiming their territory, writing the gang name on the wall. And the fact that Mr. Daniels could have surrendered peacefully and been taken into custody. He chose the other way. He chose to attempt to flee and in the same instance injure an officer in the process.

answering the hypothetical. Indeed, when the entirety of the exchange is considered, it is clear that Detective Shaw's isolated reference to Daniels "was not tantamount to expressing an opinion as to defendant's guilt," and was therefore not improper. (*People v. Ward*, *supra*, 36 Cal.4th at p. 210.)

We agree with the Attorney General that the cases cited by Daniels -- *People v. Killebrew* (2002) 103 Cal.App.4th 644 and *In re Frank S.* (2006) 141 Cal.App.4th 1192 -- do not compel a contrary conclusion. In *People v. Killebrew*, the expert testified "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*People v. Killebrew*, *supra*, at p. 652, fn. omitted.) The expert's testimony was the only evidence offered to establish the elements of the crime, and as such, it "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id.* at p. 658.) Similarly, in *Frank S.*, the expert specifically was asked to provide an opinion as to the defendant's subjective intent in carrying a concealed knife and answered that the defendant possessed the knife for protection. (*In re Frank S.*, *supra*, at pp. 1195-1196.) The testimony in these cases accordingly went beyond the scope of a permissible expert opinion by attributing a specific intent to the defendant's actions, and in essence, advising the jury how to decide the case. Here, despite the single reference to Daniels, Detective Shaw did not invade the province of the jury in rendering his expert opinion.

Daniels also asserts that Detective Shaw's testimony was insufficient to support that the assault and battery counts were committed with the specific intent to promote, further, or assist in the criminal conduct of the 89th Street East Coast Crips. According to Daniels, the expert testimony that he "chose to attempt to flee and in the same instance injure an officer" merely established that his intent in assaulting Deputy Carr was to facilitate his own escape, not to promote or assist his gang. We conclude, however, that based on the totality of the evidence in this case, the jury reasonably could have inferred that Daniels had the requisite intent for each of the gang enhancements.

With respect to the crime of vandalism, the jury heard testimony that Daniels was an admitted member of the 89th Street East Coast Crips, that he had multiple gang

tattoos, and that he was caught spray painting graffiti in a territory claimed by his gang. The jury also heard expert testimony that the type of graffiti that Daniels spray painted served to mark the territory of the 89th Street East Coast Crips and to disparage certain rival gangs. With respect to the crimes of assault and battery, the jury heard testimony that the police interrupted Daniels while he was putting up the graffiti, and that after initially feigning cooperation, he threw a spray paint can directly at Deputy Carr's face from a distance of five feet. In addition, the jury heard expert testimony that gang members considered it a badge of honor to injure or kill a peace officer and that a gang member who committed such an act of violence would gain notoriety for himself and his gang. From this evidence, the jury reasonably could have concluded that Daniels committed the assault and battery on Deputy Carr not merely to evade arrest and to aid in his escape, but also to promote, further, or assist in the criminal conduct of his gang. Consequently, the jury's true findings on the gang enhancement allegations were supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.